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# Comparable Worth and the Presumption of Equality: What Does Justice Require

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# COMPARABLE WORTH AND THE PRESUMPTION OF EQUALITY: WHAT DOES "JUSTICE" REQUIRE?

## I. INTRODUCTION

Comparable worth, "equal pay for work of comparable value," has become the political fairness issue of the '80s. The rhetoric of the 1984 presidential candidates characterized the issue as one of "unjustified intrusion into our private lives" versus one of "fairness and justice for women."[1] These themes of infringement of liberty interests versus the need for ensuring fairness are a variation on the tension between liberty and equality in American jurisprudence and political theory.[2] The debate also involves implementation of the theory of distributive justice[3] in the language of the Equal Pay Act of 1963[4] and Title VII of the Civil Rights Act of 1964.[5] The federal statutory language of equal pay for equal work[6] reflects a public policy of equality in employment, yet employment statistics show a continuing earnings gap between wages paid women and those earned by men.[7] Feminists continue to advocate for pay equity, but they have not always supplied a theoretical basis for their beliefs, nor have they analyzed the rhetoric of their opponents.

This Note will outline a basis for comparable worth ideology in the theories of distributive and corrective justice and suggest that justice defined according to an equal access model of distributive justice[8] will affect the underpayment of women workers only slowly. Equal employment strategies which focus only on equal access to employment are not sufficient to achieve actual equality. To the contrary, strategies developed according to a theory of corrective justice,[9] such as comparable

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[1] *White House Aide Calls Comparable Pay Crazy Idea*, Dominion Post, Oct. 19, 1984, at 1, col. 1.

[2] *See generally* J. ROLAND PENNOCK, DEMOCRATIC THEORY (1979).

[3] ARISTOTLE, NICOMACHEAN ETHICS, BOOK V (W. Ross trans. 1925). A modern theory of distributive justice is the subject of J. RAWLS, A THEORY OF JUSTICE (1971).

[4] Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982).

[5] Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17 (1982).

[6] 29 U.S.C. § 206(d)(1) (1982). Similar language is found in W. VA. CODE § 21-5B-1 to 6 (1981).

[7] HOUSE SUBCOMM. ON HUMAN RESOURCES, 98TH CONG., 2D SESS., REPORT ON PAY EQUITY: EQUAL PAY FOR WORK OF COMPARABLE VALUE (1982).

[8] The theory of distributive justice focuses on the fair allocation of resources. Fair procedures or means of allocation are necessary to ensure that resources are allocated justly. John Rawls, a noted philosopher on the topic of justice, conceived of justice as requiring that all primary social goods be distributed equally unless an unequal distribution would be to everyone's advantage. J. RAWLS, *supra* note 3, at 150. Rawls' theory focuses on procedural fairness to achieve a just distribution of resources. Thus, one might surmise that to achieve justice in the employment discrimination context, the legal system need only require equal access to employment so that as jobs become available, they will be distributed fairly.

[9] Corrective justice can be characterized as a theory of justice which, in the employment discrimination context, requires the correction of wrongs, such as the unfair distribution of resources. Therefore, where two jobs are of comparable worth and one is dominated by men, the other, by women and the "women's job" pays less because the pay scale was set according to the market rate which resulted from past discrimination against women, the legal system must correct the difference in pay which resulted from the unfair distribution of resources—distribution according to the market rate which originated in past discrimination, discrimination which is now illegal.

worth strategies which focus on outcomes, are more likely to achieve actual equality and fairness in employment and correct past discrimination against women. This Note will begin with a discussion of the "earnings gap" and the inequalities of the wage structure for women. The discussion will then examine equal pay, equal opportunity, and comparable worth litigation to analyze the rhetoric of proponents and opponents. Third, the Note will present the views of theorists on justice, fairness, and equal opportunity and then will indicate how the current debate on wage parity might be analyzed in terms of their views. Fourth, some suggestions for applications of a theory of corrective justice to the comparable worth dialogue will be presented.

## II. THE "EARNINGS GAP": EQUAL WORK AND UNEQUAL WAGES

The wage gap between women and men is a most persistent symptom of sexual inequality in employment in the United States. Women who work fulltime, year-round are paid only two-thirds of that earned by their male counterparts, and this ratio has been essentially the same since 1930. In 1955, women received sixty-four cents for every dollar men received. This figure dropped to fifty-seven cents in 1974, and 1978, a full-time year-round working woman was paid fifty-six cents, while in 1983 it had risen to sixty-two cents.[10]

The single most important source of the wage gap between men and women is the concentration of women in a narrow range of low-paying occupations. Census data from 1980 indicate that more than one-half of all women work in occupations which are over seventy percent female, and twenty-five percent of them are in jobs which are more than ninety-five percent female. In addition, in 1982, more than fifty percent of all female employees were found in only twenty of a total of four hundred twenty-seven occupations.[11]

The relationship between job segregation and women's low wages is documented by a 1981 study by the National Academy of Sciences which concludes that a significant portion of the wage gap between the sexes is due to sex discrimination. The study, *Women, Work and Wages: Equal Pay for Work of Equal Value*, concluded "The more an occupation is dominated by women, the less it pays."[12] For example, in the textile products industry where women comprise eighty-two percent of the employees, the earnings of employees rank fiftieth among major industries. On

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[10] WOMEN'S BUREAU, U.S. DEP'T. OF LABOR REPORT NO. 673, THE FEMALE-MALE EARNINGS GAP: A REVIEW OF EMPLOYMENT AND EARNINGS ISSUES 1 (1982) [hereinafter cited as EARNINGS GAP].

[11] *Id.*

[12] COMMITTEE ON OCCUPATIONAL CLASSIFICATION AND ANALYSIS, ASSEMBLY OF BEHAVIORAL AND SOCIAL SCIENCES, NAT'L RESEARCH COUNCIL, NAT'L ACADEMY OF SCIENCES, WOMEN, WORK AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE 28 (D. Treiman & H. Hartman ed. 1981) [hereinafter cited as WOMEN, WORK AND WAGES].

the other hand, mining, where women comprise barely five percent of the employees, ranks first in average hourly earnings.[13]

One of the most interesting examples of the job segregation of women comes from the United States Office of Personnel Management which uses a standardized occupational grading system for federal government employees. In the grading system (GS) 18 grades are defined on the basis of knowledge required for the position, the degree of autonomy, and other factors. A GS level is assigned to each job in the federal civil service, and this level determines its pay range so that the GS hierarchy is also a pay hierarchy. Women are concentrated in lower grade, mostly clerical, jobs.[14]

TABLE 1[15]

Percent Female by Occupational Grade (GS Level) in the Federal Civil Service for Full-time, White-collar Employees of Federal Government Agencies 1977

| GS Level | Percentage Female | Percentage Distribution of All Employees |
|---|---|---|
| 16-18 | 3 | a |
| 14-15 | 5 | 6 |
| 12-13 | 10 | 19 |
| 9-11 | 30 | 24 |
| 5-8 | 63 | 30 |
| 1-4 | 77 | 20 |
| TOTAL | 43 | 100 |
| N | (615,342) | (1,429,645) |

a = Less than 0.5 percent

Job segregation of minorities and women is common in the labor market and is prevalent even where occupations are integrated by sex. Since labor markets tend to incorporate and perpetuate the subordinate social roles assigned to women and

[13] WOMEN'S BUREAU, U.S. DEP'T OF LABOR, FACTS ON WOMEN WORKERS i (1982) [hereinafter cited as WOMEN WORKERS].

[14] WOMEN, WORK AND WAGES, *supra* note 12, at 40-41.

[15] *Id.* at 41.

minorities in the past, it is not surprising women hold low-paying jobs with limited opportunities.[16] Three explanations for job segregation have been offered: women choose jobs that pay poorly, women are excluded from higher paying jobs, and jobs women hold tend to be underpaid because they are held by women.

### A. *Choice*

*Women, Work and Wages* discusses three reasons offered to support the suggestion that women choose low paying jobs.[17] The first is that women are socialized into believing some jobs are appropriate. Women therefore pursue education and training that prepares them for a selected set of female-dominated jobs. Women may also lack information about other available jobs. A lack of role models in other than female-dominated jobs may perpetuate this socialization. Second, it is also possible women structure their work choices based on family obligations, choosing jobs that are easy to leave and enter, jobs that do not require the continuous accumulation of skills, or jobs with limited demands—restricted hours, no overtime, summers free. Or they may defer to their husbands' careers, moving often and taking jobs that are available. Their family demands may make advancement difficult. Third, women may be unwilling to take nontraditional jobs because of discrimination. Studies of these factors have proved difficult and have had mixed results.[18] What is clear is that women are working despite marriage and children under age six.[19]

### B. *Exclusion*

A second explanation for the concentration of women in low-paying jobs is that they are excluded from higher-paying ones. Such discrimination is well documented.[20] Historically women were excluded from jobs in the name of protection, but recent studies have shown discrimination in occupational assignment regardless of Title VII.[21]

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[16] *Id.* at 52.

[17] *Id.* at 53.

[18] Polachek, *Occupational Segregation: An Alternative Hypothesis*, 5 J. CONTEMP. BUS. 5 (1976) (Women choose jobs that will be least affected by interruptions). *But see* Corcoran & Duncan, *Work History, Labor Force Attachment, and Earnings Differences Between the Races and Sexes*, 14 J. HUM. RESOURCES 18 (1979) (Women probably do not choose their occupations to minimize income loss).

[19] Bureau of Labor Statistics, Press Release No. 80-767 (Dec. 9, 1980).

[20] Blumrosen, *Wage Discrimination, Job Segregation and Title VII of Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397, 428-60 (1979). *See also* Chamallas, *Exploring the "Entire Spectrum" of Disparate Treatment under Title VII: Rules Governing Predominately Female Jobs*, U. ILL. L. REV. 1, 1-2 (1984).

[21] B. Malkiel & J. Malkiel, *Male Female Pay Differentials in Professional Employment*, 3 AM.

C. *Underpayment of Women's Work*

A third explanation is that pay rates are influenced by the sex composition of the work force as well as the content of the job. The evidence for the undervaluation of women's jobs comes from employer job evaluation studies. Such studies rate jobs on "compensable factors," aspects of the job which the employer regards as important in setting wage scales. Such factors usually include the skill, effort, and responsibilities required by the job, and the nature of working conditions involved.[22] After the jobs are rated, they are then rank ordered by value. The value placed on a job is always related to dollars, but the dollar value can be based on market value or internal value.[23]

It is job classification studies that provide the best evidence of the sex differential in wage rates. Many discriminatory market pay practices antedated equal pay legislation. These historically-based pay practices paid women less than men in separate, segregated wage structures which were not illegal when established but were not changed when employers switched to single pay systems after passage of equal pay legislation in 1963. Instead, higher male grades were simply renumbered so that the sex differential in pay was preserved.[24] A more recent example is a job classification study performed for the State of Washington in 1974 which concluded that on the basis of measured job content, women's job classifications were paid approximately twenty percent less than men's.[25] The report also noted that the salary structures were "developed from historic position alignments supported by extensive surveys of prevailing practice of private business and other governmental organizations."[26]

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ECON. REV. 703 (1973) (Women were assigned to lower-level jobs than men with the same qualifications). *See also* Talbert & Bose, *Wage Attainment Processes: The Retail Clerk Case*, 33 AM. J. SOC. 403 (1977) (Men in retail sales were more likely to be assigned to departments such as furniture or large appliances where their commissions were larger). *See generally* WOMEN, WORK AND WAGES, *supra* note 12, at 44-65.

[22] E. Brennan, Job Evaluation Practices and Their Impact on Equitable Pay for Women 3 (1983) (working paper prepared for the National Commission on Working Women). *See generally* Blumrosen, *supra* note 20.

[23] Market value relates to the competitive marketplace for employees and therefore is tied to what other employers pay for similar jobs. Internal value, on the other hand, relates to the dollar value hierarchy within an organization. E. Brennan, *supra* note 22, at 1-3. *See* Brennan, Thomsen Assoc., Inc. of St. Louis, Mo., Discussion of Salary Grades, Prepared for the National Commission on Working Women 1-3 (Fall 1983). *See* Blumrosen, *supra* note 20, at 429 n.130.

[24] Newman & Vanhof, *"Separate But Equal"—Job Segregation and Pay Equity in the Wake of* Gunther, 2 U. Ill. L.R. 269, 269-70 (1981). *See also* Eyde, *Evaluating Job Evaluation: Emerging Research Issues for Comparable Worth Analysis*, 12 PUB. PERSONNEL MGMT. J. 428-29 (1983) (Ms. Eyde points out that when clerical workers were male they were paid as well or better than craft workers. With the advent of office occupations becoming women's work, however, skilled crafts are paid at a rate twice that of clerical workers).

[25] Willis, State of Washington Comparable Worth Study (Sept. 1974) (unpublished manuscript).

[26] *Id.* at 20 n.3. This study formed the basis for AFSCME v. Washington, 32 Fair Empl. Prac. Cas. (BNA) 1577 (1983).

The basis of a major portion of the wage disparity between men and women is discrimination as a result of job segregation. On the basis of painstaking examination of relevant studies and data, *Women, Work and Wages* concludes:

> discrimination [is] one of the important mechanisms that have contributed historically to the creation of segmented labor markets. In addition, the ways work is organized . . . incorporate and reproduce patterns of unequal access and disparate rewards for different groups of workers. Rigidities such as custom, tradition, barriers to mobility, and administrative rules tend to prevent change and to reinforce established patterns. Thus hierarchy and inequality, including discrimination, are seen to be part of labor markets.[27]

## III. Comparable Worth Litigation: Testing the Legislative Rhetoric of Equal Employment Opportunity

In the past, the intent of equal opportunity legislation and litigation has been to eliminate discrimination by altering promotion and hiring practices. But these efforts have not touched wage discrimination in women's jobs because eighty percent of women work in sex segregated jobs that have little opportunity for promotion or movement to other types of work. Moreover, job growth indicators project that most new jobs will be in the service sector where women already predominate.[28] These projections suggest women will continue to do the work they are doing now for the foreseeable future. Women will continue to work as librarians, clericals, nurses, teachers, and waitresses despite increasing numbers of women graduating in law, medicine, accounting, business, and engineering. Two-thirds of all new workers in the past several decades have been women, yet most are victims of gender-based wage discrimination that cannot be touched by the Equal Pay Act as it is interpreted by the courts.[29] A change in legislation or statutory interpretation is needed if there is to be an adequate remedy for wage discrimination.

### A. *Federal Law*

Two federal statutes govern gender-based wage discrimination action, the Equal Pay Act of 1963 (EPA)[30] and Title VII of the Civil Rights Act of

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[27] Women, Work and Wages, *supra* note 12, at 62.

[28] E. Norton, Keynote Address at the Women, Work and Worth Conference of the Maryland Women's Commission 1 (Feb. 18, 1984).

[29] *Id.* at 2.

[30] 29 U.S.C. § 206(d) (1982). The purpose of the Equal Pay Act is set forth in § 2 of Pub. L. No. 88-38, which provides as follows:

> (a) The Congress hereby finds that the existence in industries engaged in commerce or in the production of goods for commerce of wage differentials based on sex—
>
> (1) depresses wages and living standards for employees necessary for their health and efficiences;

1964.[31] While the Equal Pay Act prohibits employers from discriminating on the basis of sex by paying unequal wages for equal work, Title VII prohibits employment practices which intentionally discriminate against women or have disparate impact against women.

Under an Equal Pay Act claim the plaintiff has the initial burden of proving she is paid less for performing a job that is *substantially equal* to a job being done by a man.[32] Once a plaintiff has met this initial burden, the defendant must show that the wage difference falls within one of the statutory exceptions and is not based on the sex of the plaintiff. Paying men and women workers differently is permitted by the Equal Pay Act if the pay differential is the result of: 1) a seniority system, 2) a merit system, 3) a system which measures earnings by quantity or quality of production, or 4) a differential based on any factor other than sex.[33]

These affirmative defenses in the Equal Pay Act were the subject of concern in the passage of Title VII of the Civil Rights Act of 1964, passed the next year. To accommodate this concern, Congress incorporated the Bennett Amendment into Title VII. The Amendment permits employers to defend a Title VII action by proving that the pay differential is authorized by the Equal Pay Act.[34] The first cases in comparable worth litigation sought to harmonize the relationship between the two statutes. In *Schultz v. Wheaton Glass Company*,[35] an EPA case, the court refused to recognize as a "factor other than sex" the employer's defense that job differences reflect a difference in an economic value to the company, noting that the EPA may not be construed in such a way as to undermine Title VII.[36] The Fifth Circuit, however, rejected the view that Title VII could be read to expand the scope of the EPA.[37] Prior to 1981 the courts generally applied the equal pay/equal work standard of the EPA in Title VII cases so that plaintiffs were unable

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(2) prevents the maximum utilization of the available labor resources;
(3) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;
(4) burdens commerce and the free flow of goods in commerce; and
(5) constitutes an unfair method of competition.

(b) It is hereby declared to be the policy of this Act . . . to correct the conditions above referred to in such industries.

Pub. L. No. 88-38, (1963) (codified at 29 U.S.C. § 206 note (1982)).

[31] 42 U.S.C. §§ 2000e-17 (1982).

[32] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (emphasis added).

[33] 29 U.S.C. § 206(d)(1) (1982).

[34] 42 U.S.C. § 2000e-2(h) (1982). The text of the Bennett Amendment provides in pertinent part as follows:

It shall not be an unlawful employment practice . . . for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29 [the Equal Pay Act].

[35] Shultz v. Wheaten Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

[36] *Shultz*, 421 F.2d at 266.

[37] Hodgson v. Brockhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970) (The Fifth Circuit also held that a market rate defense could not be used under the EPA "factor other than sex" exception.).

to successfully plead a prima facie case of gender-based discrimination under a comparable work standard.[38]

B. *The Supreme Court*: County of Washington v. Gunther

The issue of how the Bennett Amendment limited Title VII was decided by the Supreme Court in *County of Washington v. Gunther*.[39] In *Gunther*, the female matrons in the female section of the county jail were paid about thirty percent less than male guards in the male seciton of the jail. The women plaintiffs argued both unequal pay and in the alternative, intentional discrimination. The district court found no equal pay violation since the plaintiffs supervised fewer prisoners and devoted a substantial part of their time to clerical duties. The district court dismissed the Title VII intentional discrimination action holding that a sex-based discrimination claim could not be brought under Title VII if the disputed practice was not unlawful under the EPA.[40] The Ninth Circuit reserved, holding that the district court should have considered the intentional discrimination claim since the Bennett Amendment incorporated only the four affirmative defenses of the EPA *not* the equal work standard.[41]

The Supreme Court's opinion in *Gunther* decided the issue of whether the Bennett Amendment meant that Title VII's prohibition against sex-based discrimination was limited to claims of equal pay for equal work. The Court held that plaintiffs can prevail in a Title VII claim by proving that their wages were depressed because of intentional sex discrimination even if their jobs were not equal to jobs held by higher paid men. The Court majority stressed that Congress intended that there be a separate and distinct Title VII claim other than in equal work cases. Both the majority and minority agreed *Gunther* does not stand for "the controversial concept of comparable worth." The majority opinion, however, acknowledges that the county did not follow its own wage survey. Despite this recognition of a wage survey, the majority stated the opinion was based on intentional

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[38] Wetzel v. Liberty Mut. Ins. Co., 449 F. Supp. 397 (W.D. Pa. 1978) (An employer who violates Title VII by segregating job classifications is not liable unless the jobs being compared are substantially equal); Roberts v. Western Airlines, 425 F. Supp. 416 (N.D. Cal. 1976) (To demonstrate denial of equal pay under Title VII, plaintiffs must show that the work of one sex required exercise of substantially equal skill, effort, responsibility, and working conditions and that the pay of men and women was unequal); Kohne v. Imco Container Co, 480 F. Supp. 1015 (W.D. Va. 1979) (The initial inquiry under Title VII is always: Are the jobs held by men and women substantially equal.).

[39] County of Washington v. Gunther, 452 U.S. 161 (1981).

[40] Gunther v. County of Washington, 20 Fair Empl. Prac. Cas. (BNA) 788, 791 (D. Or. 1976).

[41] Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979). The court did suggest that proof of discrimination in wages paid to men and women in sex-segregated job classifications would state a claim under Title VII. *Id.* at 891 n.11 (In denying the county's motion for a rehearing, the Ninth Circuit subsequently clarified this point, making it clear that proof of comparable work, *standing alone* would not state a claim under Title VII.).

discriminatory treatment.[42] The Court's decision seemed to support the Ninth Circuit's view that evidence of unequal but comparable work may support an inference of intentional wage discrimination.

### C. *Post*-Gunther *Comparable Worth Decisions*

While comparable worth theories have not often prevailed in post-*Gunther* litigation, a Title VII wage discrimination theory has started to emerge. This theory compares the skill, effort, responsibility, and working conditions of different jobs, and if the jobs are *similar* and have been historically *sex segregated*, these facts may be sufficient to support a plaintiff's initial burden of proof under Title VII.[43] Under Title VII analysis, therefore, it is enough to prove the jobs of men and women are sufficiently *similar* to remove the factor of job content as an explanation for a wage differential. This theory follows the traditional Title VII principle that once all legitimate reasons for a wage differential have been eliminated, it is more likely than not that an employer has based a difference in wage on an impermissible factor such as sex.[44] However, where a Title VII plaintiff does not show equal work, an employer may rebut the prima facie showing by articulating a legitimate reason for the wage differential. If the defendant is able to articulate a legitimate reason, the plaintiff may then try to show the reason was merely a pretext for discrimination.[45]

This Title VII formula proved successful for library workers in Portland, Oregon.[46] A female bookmobile driver sued under Title VII because her wages were lower than a male delivery truck driver employed by the library. The district court first pointed out a Title VII plaintiff may prevail by proving either equal work or intentional discrimination. In analyzing job content, the court found the plaintiff met her burden of showing equal work since the job components were substan-

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[42] *Gunther*, 452 U.S. at 166.

[43] Lorber & Kirk, *A Status Report on the Theory of Comparable Worth: Recent Developments in the Law of Wage Discrimination*, 12 PUB. PERSONNEL MGMT. J. 332, 340 (1983).

[44] *Id.* at 341.

[45] The three step Title VII analysis was first articulated in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Its application to compensation cases is demonstrated in Briggs v. City of Madison, 536 F. Supp 435 (W.D. Wis. 1982). In *Briggs*, public health nurses, almost all female, alleged the city paid them less than public health sanitarians, all men. The nurses claimed their jobs were substantially similar to those of the sanitarians yet they received 15% less pay. The court agreed the nurses established a prima facie case. It found nurses and sanitarians occupied sex-segregated job classifications and that the nurses' jobs required skill, effort, and responsibilities at least equal to that of the sanitarians who worked under similar conditions. However, the nurses failed to win the case. The city relied on a defense that higher wages were necessary to retain sanitarians, and the court concluded the nurses failed to show the reason was pretextual.

[46] Lanegan-Grim v. Library Ass'n, 31 Fair Empl. Prac. Cas. (BNA) 865 (D. Or. 1983).

tially equal. Since the only significant defense advanced by the defendant was that the jobs were different, the plaintiff prevailed on her equal work theory. The court then addressed the plaintiff's intentional discrimination claim. Since the plaintiff met the initial burden of proving the jobs were essentially similar, this showing would support an inference of intentional discrimination based on historical discrimination. Although the defendant did point to sufficient differences to rebut plaintiff's initial showing of disparate treatment, the plaintiff was able to prove these differences were a pretext for discrimination. The court referred to remarks by the defendant of a sexist and derogatory nature and uncontested testimony that the head librarian had explained the pay differential to the plaintiff by remarking that the delivery truck driver was a man with family responsibilities.[47]

Title VII, as interpreted since *Gunther*, requires plaintiffs to show that the content of jobs held by women and the content of jobs held by higher paid men are so similar that the job content factor cannot explain the wage differences. The Title VII analysis, however, gives employers a legitimate business reason defense. The extent to which a market rate defense will succeed in rebutting the claim of the discrimination remains to be settled.

### D. *The* AFSCME v. State of Washington *Decision*

A major wage discrimination case for women has been *AFSCME v. State of Washington*.[48] The District Court for the Western District of Washington held that a showing by the plaintiff that the *employer* had determined different jobs to have equivalent value may be used to establish a prima facie claim under Title VII. Under this analysis the plaintiff must prove (1) that the employer attributed equal or comparable values to dissimilar jobs and (2) that the female plaintiff is employed at one of these jobs and is paid less than a man employed at a job with comparable value.[49] According to the court, the failure of the state to pay employees on the basis of the comparable value of the jobs was either (a) disparate treatment of women without a business justification or (b) the result of intentional discrimination on the basis of sex.[50] The result was a Title VII violation in either case.

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[47] *Id.* at 871.

[48] AFSCME v. State of Washington, 578 F. Supp 846 (W.D. Wash. 1983).

[49] *Id.* at 861. *See* EQUAL PAY, EMPLOYMENT DISCRIMINATION LAW 51 (2d ed. Supp. 1983). For a discussion of the market conditions defense *see* Pauley, *The Exception Swallows the Rule: Market Conditions as a "Factor Other Than Sex" in Title VII Disparate Impact Legislation*, 86 W. VA. L. REV. 165 (1983).

[50] *AFSCME*, 578 F. Supp. at 861. (The court noted it was not required to make its own subjective assessment as to comparable worth since the state had adopted such a study and estimated the extent of the disparity.).

### E. *Defenses to Wage Discrimination Claims*

While a market rate defense was not accepted under EPA analysis,[51] courts have apparently accepted the business reasons defense in Title VII cases. The Ninth and Fifth Circuits have held that employers may not use prior salary information in setting starting salaries for substantially equal jobs unless the differentials in starting salaries indicate superior background or experience—an acceptable business reason.[52] For example, the Ninth Circuit in *Kouba v. Allstate Insurance Co.*[53] seems to require more than "any business reason" to justify salary disparities where men and women are performing substantially similar work and there is a history of wage discrimination.[54]

## IV. Opponents' Views

The opponents of comparable worth argue that comparable worth is not the best way to achieve equality in the work place. The first argument is that comparable work evaluation systems have their own biases, are imprecise, and will continue the inefficiencies and inequalities that are built into the present wage hierarchy. As one writer explained, "[T]oday we overpay lawyers regardless of their need, skill and general value to society, because we are irrationally adversarial, credential-loving snobs who hope someday to behave more sensibly; in a world governed by comparable worth we would do so because it is the law."[55]

A second argument focuses on the threat to the free market system and the spectre of a planned economic system. A typical concern was expressed in *Briggs v. City of Madison*:[56]

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[51] *Hodgson*, 436 F.2d 719.

[52] *Briggs*, 536 F. Supp. at 447. *See supra* note 45. In Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981), *vacated and removed on other grounds*, 459 U.S. 806 (1982), the Fifth Circuit held market forces provided a legitimate business reason for salary discrepancies between engineering and law faculties (mostly male) and lower-paid social science professors where more women were employed. *Wilkins*, 654 F.2d at 395.

[53] Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982).

[54] The Fifth Circuit affirmed a district court ruling that "prior salary" as a reason for paying women less than males doing identical work was discriminatory because it perpetuated lower salary levels paid to women. Neeley v. Metropolitan Atlanta Transit Auth., 24 Fair Empl. Prac. Cas. (BNA) 1610 (N.D. Ga. 1980), *aff'd*, 641 F.2d 877 (5th Cir. 1981). *See also Kouba*, 691 F.2d 873. In *Kouba*, a Title VII case, the Ninth Circuit reversed and remanded the district court judgment that prior salary may never be a "factor other than sex" because it perpetuates historic sex discrimination. Instead, the Ninth Circuit determined the employer must use prior salary reasonably for a legitimate business purpose.

[55] Cowley, *Comparable Worth. Another Terrible Idea*, Wash. Monthly (Jan. 1984).

[56] *Briggs*, 536 F. Supp. at 445.

> Under Title VII an employer's liability extends only to its own acts of discrimination. Nothing in the Act indicates that the employer's liability extends to conditions of the marketplace which it did not create. Nothing indicates that it is improper for an employer to pay the wage rates necessary to compete in the marketplace for qualified job applicants.[57]

One commentator summed up these objections, "[A]bsent professionally developed and judicially approved standards, it is simply unfair and economically unsound to penalize specific employers who follow marketplace pay practices who are not themselves at fault."[58] The minority report in *Women, Work and Wages* reiterates these problems stating that the relationship between worth and pay is a product of real impartial market forces and cannot be ignored.[59] This report suggests that job evaluation systems should be closely tied to prevailing rates in the labor market.[60]

A third argument parallels one used against affirmative action policies. It suggests any plan designed to rectify discrimination against a group of people fails when it rewards members of the group who have not suffered from the discrimination in the past and are not burdened with discrimination now, instead of the group members who have suffered from discrimination and are suffering from it now. The argument would suggest women who do not wish to be clericals or nurses should instead become accountants, physicians, or construction workers. Pay rates for women as a group would be automatically increased if they would enter nontraditional jobs which pay better.

These opponents sharply protest favoring or "equalizing" chances for groups who have suffered past discrimination by favoring others in the same group—reverse discrimination—because rather than eliminating discrimination it merely institutionalizes it. In the words of one writer, "drawing distinctions based upon one's sex [or race, national origin, and so forth] transmits an illegal act of bigotry into a socially encouraged exercise in affirmative action. . . ."[61]

A fourth argument is that the pursuit of equality exacts an unacceptable price in human liberty. A public policy of equality interferes with the freedom to contract with whom one chooses, freedom to dispose of property, and freedom of choice over one's tenants and employees.[62] Such restraints on freedom are seen as Orwellian and inappropriate for a free society.

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[57] *Id.* at 447.

[58] Leach, *Is the Market Rate A Comfort Zone?* 1 PAY EQUITY TRENDS 3-4 (July 1984).

[59] McCormick, *Minority Report*, WOMEN WORK AND WAGES, *supra* note 12, at 117.

[60] *Id.* at 119.

[61] Hunter, *Liberty and Equality: A Tale of Two Codes*, 29 McGILL L.J., 2, 5 (1983).

[62] *Id.* Hunter suggests human rights litigation replaces "the religious vision of heaven" with "a utopian vision of an equalitarian society . . . To criticize human rights legislation and its promises is regarded as antediluvian if not blasphemous." *Id.* at 23.

The fifth argument is that paying women according to comparable worth principles costs too much especially since estimates of up to one billion dollars have been made of the liability for pay equity and back pay in *AFSCME v. State of Washington*.[63] The critics of comparable worth also suggest that raising the wages of the "eighty percent" will cause such jobs to become too expensive. Employers will then either automate the jobs or export them to third world countries where wage rates are lower. In either case the women jobholders will lose their jobs.

Mayor Coleman Young of Detroit expressed the concern of the public employer, "any time a city gets hung up on an abstract study that makes arbitrary comparisons of jobs but does not take into account the impact on society and its ability to pay, that's dealing in potential anarchy and inviting bankruptcy and the collapse of local government."[64]

Without answering the critics allegations directly, it can be noted that they generally agree that equality in wage rates for *the same job* should be implemented and enforced. They also generally approve of enforcing equality of opportunity in hiring, promotion, and pre-employment training and education based on merit and characteristics directly associated with the job. They do not believe market-rate wage setting practices are discriminatory. Their nondiscrimination model assumes equal access, equal information, equal mobility, and equal socialization. Their approach also excludes any efforts that might interfere with current business practices except those that make all hiring and promotion decisions gender neutral. They consider the gender neutral stance an acceptable interference with liberty because it is moral, legal, or in accordance with current community norms.

## V. Advocates' Arguments

Comparable worth advocates, on the other hand, contend comparable worth should be implemented because sex-based wage discrimination is illegal according to Title VII. The Supreme Court has unequivocally ruled that *intentional*, sex-based wage discrimination provides a cause of action under Title VII. To quote the lead counsel, Winn Newman, in *AFSCME v. State of Washington*, "The Supreme Court's holding that separate but equal is 'inherently unequal' applies with equal force to race or sex segregation in the work place. A job structure which is segregated by race or sex inevitably results in wage discrimination."[65]

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[63] *AFSCME*, 578 F. Supp. 846. Women employees in job positions in which discrimination has occurred will be paid back wages to September 16, 1979. In addition, the state was ordered to correct pay inequities immediately. The case is on appeal.

[64] Farnquist, Armstrong & Stausbaugh, *Pandora's Worth: The San Jose Experience*, 12 Pub. Personnel Mgmt. J. 366 (1983).

[65] Newman, *Statement to Equal Pay Joint Comm.*, reprinted in 12 Pub. Personnel Mgmt. J. 382, 383 (1983).

The advocates also contend comparable worth should be implemented because the employer defenses to equal pay lawsuits have several fallacies. The first employer defense is the market argument that wages are established by supply and demand, not discrimination. While this defense seems superficially accurate, supply and demand actually have little effect on wages in female-dominated professions. Much wage discrimination is a product of "initial assignment" discrimination in which unskilled entry level employees are assigned to different jobs on the basis of sex. Female jobs are inevitably paid less. Overcrowding in traditionally female occupations does not justify paying women a discriminatory wage.

The second defense, the "apples and oranges" argument, is that it is not possible to determine objectively the value of two different jobs. While exactness is not possible, every major employer already uses some method to evaluate the relative worth of each job classification so that higher paid jobs are expected to reflect a greater degree of skill, effort, and responsibility. Comparable worth requires nothing more than removing sex discrimination from the job rating system.

A third employer defense is the "cost" argument, that is, the cost of eliminating wage discrimination is too high. Advocates answer that cost is not a defense to unlawful discrimination. Congress rightfully imposed the cost of discrimination on the wrongdoer, not the victim.[66]

## VI. The Philosophical Underpinnings of Equality

Equal pay legislation is based on three underlying assumptions: justice, fairness, and equality. Justice requires that people be treated equally. Justice also requires people to be treated fairly. Fairness requires that when distinctions are made among persons, it is necessary to examine the basis for the distinctions—the reasons offered for the different treatment. What is important if one is to be fair and just is not that a law discriminates among people, but that it discriminates badly.[67] The question then becomes how to decide what constitutes fair discrimination. Equal rights cases have been decided on a number of theories: case-basis equity, an appeal to moral rules, and a variety of distributive justice rationales. It is distributive justice, the view that those similarly situated should be treated alike, that has caused pay equity advocates the most difficulty in harmonizing equality and fairness with notions of comparable worth.

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[66] The theses of the advocates argument is found in Winn Newman's testimony to a legislative committee in Iowa on the need for a comparable worth study. *Id.* at 382-85.

[67] Aristotle, *supra* note 3, at 12-29.

### A. *Case-basis Equity*

In determining whether a law discriminates fairly, one possible mode of analysis is case-basis equity. This form of equity decisionmaking requires that the peculiar or unique facts of a case be taken into express account and given primary significance in order to do justice in a particular case. The rule of decision in case-basis equity would prescribe that a decision is just if the consequences of the decision are found to be more desirable to the litigants than any other decision.[68]

The arguments for comparable worth seem based, in part, on case-basis equity. The appeal is to the merits of the petitioner's claims in terms of fairness and past injustice. The language of the statutes, however, seems based on much more vague equality principles. These distinctions may provide insight into some of the problems of comparable worth litigation. Where equitable principles are pleaded in a case of wage discrimination based on statutory prohibitions, the court will look to the law and leave equity to the legislature. Only in extraordinary circumstances have courts considered the equitable decision to be within their ambit.

### B. *Appealing to Moral Rules*

A second method for determining whether a law discriminates fairly is an appeal by the legal system to moral rules or principles. Under this view courts are instructed to consider moral rules and principles as the criteria to justify decisions. An appeal to moral rules may merely be a call for new or altered legal rules. A call for a more "equitable" result may actually be a call for a changed legal standard.[69]

Here, too, comparable worth advocates will likely appeal to moral rules or "rightness," often expressed as justice or fairness. Frequently, this appeal seems lost on a legal-minded court. Such appeals are brought on constitutional, individual rights grounds in an attempt to change a legal standard because the standard violates some natural right protected by the Constitution. Since the right to equal pay has not been established as a constitutional right, this type of appeal to a moral principle has not been a basis for comparable worth litigation.

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[68] This description of the proper analysis of discriminatory law is Richard Wasserstrom's. Wasserstrom, *Equity*, in JUSTICE: SELECTED READINGS 42 (J. Feinberg & H. Gross ed. 1977). For a provocative discussion of the difficulty of replacing gender classifications as a proxy for functional classifications in Title VII cases see Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 L. & INEQUALITY 33, 84-85 (1984) (moving to a functional classification system as the heart of compensation discrimination litigation).

[69] Wasserstrom, *supra* note 68, at 43.

### C. *Distributive Justice Approaches to Comparable Worth*

One of the barriers to the use of equity in court decisions concerning wage discrimination between men and women is the principle of distributive justice, which requires that like cases or like individuals are to be treated alike. A system of justice requires a system of rules or regulations which are followed in determining how social goods are to be distributed. One of these rules, grounded in democratic theory, is that distribution is to be made in equal shares. Equalitarianism—procedural equality—states that equality of treatment is the rule and needs no justification, whereas unjust treatment must be justified.[70]

#### 1. Equalitarian Versus Inequalitarian Views of Justice

In jurisprudential thought two views of equality can be found: equalitarian and inequalitarian. The major difference in these conceptions of equality is illustrated by how each view answers the question: Are people equal? An equalitarian almost always says yes, while an inequalitarian says no. There is a distinction between the question as a factual one, "Are people in fact equal?" and the question as a normative one, "Ought all people to be treated as equal?" Equalitarians would answer yes to the normative question and might answer no to the factual one. Inequalitarians, on the other hand, would answer no to both questions, saying people should be treated differently because they are different.[71]

These views of equality give a clue to an understanding of the wage equality arguments. The normative question is: Ought women to be treated equally with men in wage structures? Equalitarians answer yes while inequalitarians answer no because men and women are not working in the same jobs. This dissimilarity is the reason to deny equal treatment, because, for the inequalitarian, things must first be made equal before they can be treated equally. Because of this view of equality, opponents of comparable worth can forcefully argue that the proper way to attain equality for women is to implement equality of opportunity, equal access, and equal treatment of women and men in the same or similar jobs. This approach is acceptable to the inequalitarians because the required showing of equality has been made by women seeking equal treatment. Women can be treated equally with men in the same jobs because they have shown the equality of the jobs. In fact, inequalitarians would probably stipulate that men and women must be treated equally in the same jobs because the equality of the jobs is apparent. However, where men and women are working in similar jobs, the inequalitarians would likely require women seeking equal treatment to prove the similar jobs are equal. On the other hand, the advocates of comparable worth adhere to the equalitarian view of equality.

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[70] Frankena, *Some Beliefs About Justice*, in JUSTICE: SELECTED READINGS 48 (J. Feinberg & H. Gross ed. 1977).

[71] *Id.*

The equalitarian view provides the rationale for the advocates' insistence on the assumption of the rightness of the principle of equality in the wage structure and the need to require a justification for inequalities.

Because of the role of the inequalitarian and equalitarian views of equality in the arguments concerning comparable worth and wage compensation discrimination, a closer examination of these views in the scheme of distributive justice is warranted. If jobs are the social goods to be distributed, the equalitarian view requires fair distribution which treats men and women equally. This approach can best be characterized as an equal treatment model of justice. Men and women are presumed equal, and sex is presumed to be an irrelevant criterion in determining wages. Equal treatment is a presumptively valid means of achieving a just distribution of social goods. Under this scheme, a deviation from equal treatment must be justified. In contrast, an inequalitarian view of equality would require a justification for equal treatment—a showing of equality—before men and women can be treated equally.

If wages are the social goods to be distributed, the equalitarian view presumes men and women are equal and shall be treated equally. Consequently, any deviation from equal treatment must be justified. Therefore, if men and women are engaged in two different jobs that are traditionally male and traditionally female, the equalitarian view requires equal treatment of men and women concerning the distribution of wages. Unequal treatment, that is, differing wages for the male-dominated job and the female-dominated job, must be justified. The burden of justification—or burden of proof—is on the individual or entity seeking to treat men and women differently. Under this view of equality, the burden is on those seeking differing wages to establish that the jobs are *not* equal or of comparable worth. For unequal treatment to be justified those seeking unequal wages must prove the skills, effort, responsibility, and working conditions of the jobs are *not* comparable.

In analyzing the application of these propositions to comparable worth, the argument that unequals should be treated differently seems the basis for the "apples and oranges" argument[72] that jobs in no way similar in content should not be treated alike because any attempt to value them is arbitrary. Comparable worth advocates then define "equal work" in terms of job components, opponents in terms of job content.

Perhaps part of the problem with the advocates' position is that they have assumed the burden of proof in justifying their equal pay concepts. They have adopted the burden of proof which belongs to those who seek unequal shares while the opponents to comparable worth accept the benefit of a presumption that unequal treatment is just. Ironically, Title VII was apparently drafted to establish equality

[72] *Supra* notes 55, 57, 58, 60 and accompanying text. *But see supra* note 66 and accompanying text.

and equal treatment as the rule. Thus, where unequal treatment is shown, one would expect the burden of proof to shift to the proponent of the unequal treatment to justify the deviation from equality. Yet, in compensation discrimination analysis, the judicial interpretation of Title VII has turned the equalitarian view and purpose of Title VII on its head. The proponents of unequal treatment are not required to justify the unequal treatment. Inequality and unequal treatment have become the rule, and the burden is placed on those seeking equality to justify equal treatment. Patently, this inequalitarian interpretation of Title VII is inconsistent with the equalitarian purpose of Title VII to realize in society the equality of men and women.

The inequalitarian interpretation is apparent in the pattern of proof in Title VII compensation discrimination analysis. The plaintiff, the person claiming unequal treatment, has the burden of showing that a pay differential is discriminatory. Only then does the defendant have to provide a reason other than discrimination to justify the wage disparity. The presumption is that unequal wages are not discriminatory, that inequality is presumptively just. This means that plaintiffs who are claiming equal shares bear the initial burden of showing why they are entitled to equal treatment rather than the defendants having the initial burden of defending their disparate wage structures. This result is opposite to the logical outcome of the equality principle: equality does not have to be defended until someone makes a claim to an *unequal* share and *then* the claim for inequality requires a reason.[73] Instead, in Title VII claims, the question of defending a claim does not arise until someone makes a claim to an *equal* share, and then the presumption that inequality is just must be overcome before the defendant is forced to give a reason. This presumption has proved a heavy burden for comparable worth proponents in litigation and other advocacy efforts.

In addition to the problem of the equality presumption, the historic and continuing discriminatory basis of job segregation on the basis of gender is not well understood. The institutional structure of wage discrimination requires a societal level rationale that explains the role of society in the allocation of values. Since many of those who espouse equality will allow unequal treatment because the differences among people sometimes justify treating them unequally,[74] the difficult question becomes what differences would justify treating people differently? Logically, the limitations—or the justifications—must be related to the context in which they are raised.[75] Differences such as sex would seem obviously irrelevant to the social policy with which distributive justice is concerned, the questions of social and economic inequalities and the distribution of income and wealth. As stated by one

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[73] The discussion of the burden of proof in the "Equality Injunction" is discussed in Beardsley, *Equality and Obedience to Law*, in LAW AND PHILOSOPHY 51-54 (S. Hook ed. 1964).

[74] Frankena, *supra* note 70, at 53.

[75] *Id.* at 54.

jurisprudential scholar, the notion of treating people equally is "a constituent condition of the Ideal."[76] Treating people differently on the basis of sex is antithetical to the notion of distributive justice which seeks a fair distribution of social goods.

2. The Problem with Procedural Justice

An alternative theory of distributive justice focuses not on conceptions of equality in the distribution of social goods but on procedural justice, that is, the fairness of the distribution. According to the theory advocated by the modern philosopher, John Rawls, the ideal of justice should be defined as it would be if those who were choosing the rules for distribution did not know how the rules would affect their personal shares.[77] A major concern in this theory is the justification of the moral obligation to obey the law. The moral obligation is founded on fair play, that is, justice as fairness.

Procedural justice is aimed at achieving institutional justice and focuses on open access because those who are barred from some places in society would feel unjustly treated by the exclusion and are unable to experience full self-realization. The correctness of the distribution is judged by the justness of the distribution scheme and in how it answers the legitimate claims of individuals within the system.[78]

As such, procedural justice can be contrasted with a theory of allocative justice, which deals with a given collection of goods to be divided among definite individuals with known desires and needs. This view leads to the classical utilitarian view where the end is to promote the greatest balance of satisfaction in society—the efficiency principle. However, as Rawls points out, utilitarianism, the rule of greater happiness for the greater number, results in inequalities for a minority whose happiness is the price at which greater happiness is bought.[79]

Examining compensation discrimination analysis under Title VII from the ultilitarian perspective, one might readily justify discrimination based on sex in order to achieve greater efficiency, lower costs of services and production, and a greater happiness for the greater number. In contrast, Rawls' theory does not justify wage discrimination, but, oddly enough, his solution does not require pay equity to achieve a fair and equal distribution of wages but instead requires equal opportunity and open access to employment. This approach does little or nothing to address the present unfair distribution of wages occurring in the female-dominated jobs which, because of past discrimination, are underpaid as compared to male-dominated jobs of comparable worth. Thus, procedural justice requires that women

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[76] *Id.* at 55. The Ideal for Frankena is "that state of affairs in which *every person* has the best life he is capable of."

[77] J. RAWLS, *supra* note 3, at 60.

[78] *Id.* at 84.

[79] Murray, *The Problem of Mr. Rawl's Problem* in LAW AND PHILOSOPHY 29 (S. Hook ed. 1964).

avoid unfair wage distribution by entering jobs where the wages are fairly distributed. The theory promotes a gradual movement towards equality and equal treatment for women who enter fair paying jobs. Yet, the theory requires the majority of women relegated to traditionally underpaid women's jobs to endure discriminatory treatment and be denied access to justice and equal treatment.

### 3. Comparative and Noncomparative Justice: the Problem of "Double Injustice"

The theory of distributive justice can also be discussed in terms of comparative versus noncomparative justice.[80] Comparative justice requires equality in treatment of all members of a class whether it is equality of consideration, equality of share, or equality of opportunity. Comparative injustice consists in arbitrary and invidious discrimination, a departure from the rule of equal treatment without good reason. Noncomparative justice, on the other hand, does not require that individuals be compared to each other but requires that each individual be compared to an objective standard. Equality of treatment, then, has no place in the concept of noncomparative justice. An example from A. D. Woozley, a theorist on justice, makes clear the "double injustice" that is inflicted on a person when comparative and noncomparative injustice coincide. It is doubly unjust if a person gets less than he or she deserves in wages while another gets more, but it would still be unjust if no one else got more.[81]

Woozley's example expresses the sense of arbitrariness and exploitation that is felt by women who are segregated in jobs in which they are not paid according to their skills, abilities, and responsibilities. It is unfair because wages in this country are seen as evidence of worth, or at least effort. Women who are underpaid because they work in women's jobs are told this underpayment results from market conditions. Regardless, they feel their jobs and gender are devalued. This devaluation is one of the invidious effects of wage discrimination. Every person would prefer to be judged on merit—his or her own contributions—a noncomparative standard. But, if the standard is comparative, that same person would prefer the comparison to be on the job related skills, efforts, and responsibilities, not on gender. Women's sense of self worth is the price paid for the maintenance of comparative injustice.

## VII. Conclusion

Advocates for comparable worth must overcome many hurdles if they are to prevail in the courtroom or the capitol. A primary need is to develop a clear, coherent, and easily communicated explanation of their position, a position that

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[80] Feinberg, *Noncomparative Justice* in JUSTICE: SELECTED READINGS 55-59 (J. Feinberg & H. Gross ed. 1977).

[81] *Id.* 61. The quote is from A.D. Woozley, *Injustice*, 7 AM. PHIL. Q. MONOGRAPH 115-16 (1973).

is based on the similarity of job requirements. Such an explanation must show that job categories dominated by one sex are presumptively suspect, not only on the basis of equal opportunity, but also in relation to wage disparity. Advocates must make the argument that the present Equal Pay Act and Title VII case analysis will not remedy gender-based wage discrimination that is based on job category, not job content.

This analysis of the equality principle suggests some starting points to structure an ideology and praxis for comparable worth. The first is that the presumption of equality must be reversed where a single gender job category is paid less than similar job categories which require similar skill, training, and responsibility. One way to shift this presumption would be to consider a prima facie presumption of wage discrimination where a job category was dominated by seventy percent of a single sex and where employees receive lower wages than job categories not dominated by a protected class. Employers then would be forced to show a valid nondiscriminatory reason for the wage disparity. Historical disparate pay practices would be presumptive evidence of discrimination, not a business reason defense. Seniority and merit system defenses would not be applicable since the comparison is to job categories that are segregated and comparisons could be made to persons within each category who have similar seniority or merit status. Productivity-based wage rates would be required for all job classes if used by any.[82]

A second suggestion is to move job evaluation practices from a comparative standard, which equates one job to another, to a noncomparative standard, which relates jobs according to dollar values derived from a job index, and insist on pay equity based upon the index amount. Such a change would allow comparable worth advocates to seek pay equity without requiring an explanation of dissimilar job content. It would also serve to neutralize rationalizations for gender discrimination and move to a national policy of wage parity for men and women. This change in rhetoric would also neutralize the arguments of those who maintain that people in different circumstances should be treated differently.

Comparable worth advocates who protest inequalities in present wage practices must refine their rhetoric to convince lawmakers and the public that such inequities should be remedied. A return to a corrective justice model with a basis in the equality presumption may provide pay equity advocates with a theoretical foundation so that the law may continue to "serve not only the functions of reflecting and conserving the antecedent order, but also those of depicting and realizing a prospective order; a creative agent that works between the poles of the actual and the ideal, what is and what ought to be."[83]

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[82] Ruth Blumrosen has recently suggested a similar "simplified proof" for Title VII wage discrimination cases. Blumrosen, *Wage Discrimination Revisited*, 8 WOMEN'S RTS. L. REP. 109, 120 (1985).

[83] JENKINS, JUSTICE AS IDEAL AND IDEOLOGY, NOMOS VI JUSTICE 199 (Frederick and Chapman ed. 1974).